NO. 49174-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Respondent,

vs.

BOB L. INMAN,

Appellant.

BRIEF OF RESPONDENT

MICHAEL E. HAAS
Jefferson County Prosecuting Attorney
Attorney for Respondent
P.O. Box 1220
Port Townsend, WA 98368
(360) 385-9180

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C. Whether exigent circumstances existed at the scene of a serious collision justifying a warrantless blood draw of Defendant's blood?

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II. STATEMENT OF THE CASE

Following a terrible motorcycle crash on May 30, 2015, in rural Jefferson County, Washington, in which the driver and a passenger had to be medevacked to Harborview Hospital, due to their injuries, the State charged the driver, Robert Inman, Defendant herein, with one count of

Vehicular Assault (alcohol/drug prong) which he was convicted of at a bench trial on May 20, 2016. RP 6[1], 8 – 11, 15 – 17, 37 – 40, CP 48.

Prior to trial the Court conducted a suppression motion in which the Court determined, *inter alia*, exigent circumstances existed justifying a warrantless blood draw of Defendant. CP 35 – 44. At a subsequent hearing the Court determined that a search warrant was not required to analyze the blood. CP 45 – 47.

The case proceeded to a stipulated bench trial. CP 48. The Court found as part of the sentencing that Defendant had a chemical dependency problem that contributed to the offense. CP 49. It also found defendant had two prior DUI convictions in Lewis County in 2006, and a separate DUI in Thurston County, also in 2006. *Id.* The Court imposed a sentence at the top end of the standard range - 14 months. CP 50 – 51.

III. ARGUMENT

A. The Trial Court's findings with respect to Assignments of Error 1 – 4 are supported by substantial evidence.

Defendant asserts portions of Findings of Fact 1, 32, 33, and 35, reflected in his Assignments of Error 1 – 4, are not supported by substantial evidence.

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[1] Deputy Przygocki testified on direct examination the incident took place on May 30, 2016. This is either a typographical error in the transcript or was incorrect. The incident clearly took place in 2015 as reflected in the testimony of Captain Manly and Sgt. Hester. RP 34, 61. Additionally the bench trial took place on May 20, 2016. CP 48.

"Generally, findings are viewed as verities, provided there is substantial evidence to support the findings. Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)[internal citations omitted]. Unchallenged findings are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). "[A]n erroneous finding of fact not materially affecting the conclusions of law is not prejudicial and does not warrant a reversal." *State v. Caldera*, 66 Wn. App. 548, 551, 832 P.2d 139 (1992). "'The party challenging a finding of fact bears the burden of demonstrating the finding is not supported by substantial evidence.'" *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002)[internal citations omitted].

Finding of Fact 1

Defendant challenges part of Finding of Fact 1, and asserts the Trial Court erred by finding the call indicated two people were injured. This may be technically accurate however, Deputy Przygocki was aware there were two helicopters in-bound for the rescue. RP 20, 32. Presumably two rescue helicopters indicated more than one patient with injuries sufficient to warrant a medivac. Assuming *arguendo* Defendant is correct, he still fails to establish how this issue is material to the Conclusions of Law adopted by the Trial Court. The State respectfully

suggests this erroneous finding, if it was erroneous, did not materially affecting the conclusions of law, is not prejudicial and does not warrant a reversal.

Finding of Fact 32

Defendant next asserts that Finding of Fact 32 is erroneous: "that paramedic Manly had previously requested that Ms. Vanderhoof be taken to a Level 1 Trauma Facility because of her injuries." *Brief of Appellant*, p. 2. Again this is technically accurate however, based on Paramedic-Firefighter Captain Manly's testimony, it is a reasonable inference from his testimony, that he is the individual that made the request with respect to Ms. Vanderhoof's injuries. "I saw two patients lying in a driveway. Saw a motorcycle that was in a ditch that approximately 20 to 25 feet away. Both patients were lying on their back." RP 37. Captain Manly first saw Ms. Vanderhoof in his ambulance before she was transferred to another ambulance. RP 48.

Although his testimony focused on Defendant, Captain Manly's testimony would also apply to Ms. Vanderhoof. For example, Captain Manly was concerned that Defendant was in an obvious motorcycle accident and had been thrown as far as he had been. RP 39. The same was equally true for Ms. Vanderhoof. RP 37. Because of the extent of damage to Defendant's helmet, Captain Manly was concerned the incident

was a "high impact, high velocity trauma incident. RP 38. Also applicable to Ms. Vanderhoof.

Captain Manly was the first person in charge of the rescue operation. RP 49. He ordered the helicopter for Defendant. RP 42. He ordered the medivac because of the nature of the call, his intuition, and prior calls. RP. 43. In his words, "I was preparing for the worst." *Id.* He needed to send Defendant to a Level 1 Trauma Center. *Id.* The only such facility in Washington, Alaska, Idaho and Montana, is the Seattle Harborview Medical Center. *Id.*

Although the State believes Finding of Fact 32 is a reasonable inference from the evidence provided, even if it is erroneous, Defendant fails to demonstrate how it is relevant or material to any Conclusion of Law made by the Trial Court. Once again, if it was erroneous, it did not materially affect the conclusions of law, was not prejudicial and does not warrant reversal.

Finding of Fact 33

Defendant challenges the Trial Court's finding that Deputy Przygocki was aware that when he arrived there was a helicopter enroute to transport Ms. Vanderhoof to Harborview. *Brief of Appellant*, p. 2.

Deputy Przygocki has been in law enforcement in Jefferson County since 2008. RP 5. That Deputy Przygocki knew Defendant would be transported to Harborview is unchallenged and therefore a verity.

Deputy Przygocki also knew there was more than one helicopter enroute. RP 20. Further, he knew Ms. Vanderhoof was injured. *Id.* Since there is only one Level 1 trauma center in this region, it is a reasonable inference based on his experience that Deputy Przygocki knew where the most serious trauma patients are taken to from Jefferson County when they are medevacked.

Although the State believes Finding of Fact 33 is a reasonable inference from the evidence provided as well, even if it is erroneous, Defendant fails to demonstrate how it is relevant or material to any Conclusion of Law made by the Trial Court. If it was erroneous, it did not materially affect the conclusions of law, was not prejudicial and does not warrant reversal.

Finding of Fact 35

Defendant challenges the Finding by the Trial Court that Deputy Przygocki did not have time to request a warrant and conducted a warrantless blood draw.

There are a number of limitations in a rural county such as Jefferson County. Cell phone service is not a given, there are a limited number of judges or court commissioners available to review search warrants, accidents occur in remote areas where a medevac is the best way to save a life, and coordination with other sister county agencies may be

needed (but doesn't always work) if a search warrant needs to be served in that county.

Deputy Przygocki asked Captain Manly to perform a warrantless blood draw on Defendant. The following factors reveal the exigent circumstances that justified the warrantless blood draw in this matter:

- The collision occurred in rural Jefferson County, Washington. RP 7, 31.
- Deputy Przygocki did not believe he would have cell phone service. RP 23.
- Deputy Przygocki first met Defendant in the back of an ambulance. RP 16.
- Defendant was about to be transported to a landing zone where he could be then medevacked by helicopter to Harborview Hospital in Seattle. RP 16.
- Defendant was about to be given an IV drip with saline. RP 39, 41.
- The IV drip most likely would have "watered down" any alcohol in Defendant's system. RP 56.
- Deputy Przygocki had participated in approximately 50 blood draws at that point in his career. RP 18.

- Obtaining the blood sample with preparation of the site and extraction was estimated to take about one and a half minutes. RP 18.
- The transport time from the collision site to the landing zone was estimated to be six minutes. RP 17,
- The flight time from the landing zone to Harborview was estimated to be about 15 – 20 minutes. RP 50.
- He estimated it would take him about 30 minutes to prepare the search warrant. RP 19.
- He estimated that going over the search warrant with a judge or court commissioner could take 15 – 20 minutes. RP 19.
- He did not have an estimate for how long it would take to locate a judge but implicit within his answer was that it was not always a given that a judge or court commissioner could be found immediately. RP 19.
- Sgt. Hester with the State patrol testified that they had never had a search warrant his team applied for be served in King County i.e., the process did not work. RP 71, 79.

In summary, the flight from the landing zone to Harborview would take 15 – 20 minutes. However, preparing the warrant, locating a judge or court commissioner (assuming one could be found quickly), and reviewing

the search warrant with a judge/court commissioner would take no less than 45 minutes by which time the Defendant could very readily have been provided any number of medications in flight or even commenced undergoing surgery, thus making the effort to obtain a search warrant for a blood draw a useless exercise.

The State submits that substantial evidence exists as outlined above, that demonstrates there is more than a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. Or as Judge Harper stated: "if there's not exigent circumstances here I don't know in what case there would be." RP 119.

B. At the time of the blood draw, the investigating officer had probable cause to arrest Defendant for vehicular assault or DUI involving serious bodily injury to Ms. Vanderhoof.

> Probable cause for an arrest without a warrant arises from a belief based upon facts and circumstances within the knowledge of the arresting officer that would persuade a cautious but disinterested person to believe the arrested person has committed a crime. The officer need not have knowledge or evidence sufficient to establish guilt beyond a reasonable doubt, for *in this area the law is concerned with probabilities arising from the facts and considerations of everyday life on which prudent men, not legal technicians, act.* [Italics added].

State v. Parker, 79 Wn. 2d, 326, 328 – 329, 485 P.2d 60 (1971).

RCW 46.61.522 provides in pertinent part:

> (1) A person is guilty of vehicular assault if he or she operates or drives any vehicle:
> ...

(b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another; or

...

(3) As used in this section, "substantial bodily harm" has the same meaning as in RCW 9A.04.110.

Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.

RCW 9A.04.110(4)(b).

RCW 46.61.502 provides in pertinent part:

(1) A person is guilty of driving while under the influence of intoxicating liquor, marijuana, or any drug if the person drives a vehicle within this state:

(a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or

(b) The person has, within two hours after driving, a THC concentration of 5.00 or higher as shown by analysis of the person's blood made under RCW 46.61.506; or

(c) While the person is under the influence of or affected by intoxicating liquor, marijuana, or any drug; or

(d) While the person is under the combined influence of or affected by intoxicating liquor, marijuana, and any drug.

Would a cautious, disinterested, and prudent person, as opposed to a legal technician, think Defendant committed the crime of either

Vehicular Assault (alcohol/drug prong) or DUI (resulting in serious bodily injury to another)? Deputy Przygocki did.

Deputy Przygocki was aware Defendant and Ms. Vanderhoof were on a motorcycle when it crashed. RP 8 – 9. He knew, based on Defendant's admission that Defendant was in fact the driver. RP10. He was told by a Sgt. with the State Patrol that Defendant had been drinking. RP 9. Defendant admitted to consuming an alcohol drink. RP 11. Additionally, Deputy Przygocki noted in his Declaration of Probable Cause: "I entered the ambulance and could smell the odor of intoxication (sic). I was advised by the paramedic inside the driver, Bob Inman, had been drinking too. I looked at Inman and noted his eyes were bloodshot and watery and exhibited droopy eyelids." CP 58 – 59.

Deputy Przygocki testified he didn't instantly suspect Defendant of criminal behavior but it developed as his investigation evolved. RP 12. Deputy Przygocki knew Defendant's injuries were severe enough to warrant a medevac to Harborview and a helicopter was enroute. RP 16, 17. Deputy Przygocki also knew the passenger was injured, being tended to by other emergency personnel and would be transported to Harborview as well. RP 9, 20.

The State submits it was reasonable for Deputy Przygocki to conclude, for the purposes of determining probable cause and obtaining a

blood draw, that Defendant should be arrested for Vehicular Assault (alcohol/drug prong) or DUI (resulting in serious bodily injury to another). The factors supporting this include:

- Deputy Przygocki's observation of the motorcycle crash scene;
- Sgt. Hester's and Captain Manly's statement to Deputy Przgocki's that Defendant had been drinking;
- Deputy Przygocki's observations of the odor of alcohol coming from the ambulance as he entered it;
- other indicators of alcohol consumption such as bloodshot and watery eyes and droopy eyelids;
- Defendant's admission to drinking;
- the potential severity of Defendant's injuries reflected by his need for air transport to Harborview;
- Ms. Vanderhoof's need to be medevacked;
- and the common sense notion that any person involved in a motorcycle crash where one person needs to be medevacked means anyone else on the motorcycle may have also received substantial injuries.

C. Exigent circumstances existed at the scene of a serious collision justifying a warrantless blood draw of Defendant's blood.

RCW 46.20.308 provides in pertinent part:

> 4) Nothing in subsection (1), (2), or (3) of this section precludes a law enforcement officer from obtaining a person's blood to test for alcohol, marijuana, or any drug, pursuant to a search warrant, *a valid waiver of the warrant requirement, when exigent circumstances exist*, or under any other authority of law. Any blood drawn for the purpose of determining the person's alcohol, marijuana levels, or any drug, is drawn pursuant to this section when the officer has reasonable grounds to believe that the person is in physical control or driving a vehicle under the influence or in violation of RCW 46.61.503. [Italics added].

Defendant correctly observes that *Missouri v. McNeely*, ___ U.S. ___, 133 S.Ct. 1552, 185, L.Ed.2d 696 (2013), requires law enforcement to obtain a search warrant for a blood draw in a DUI unless exigent circumstances exist. 133 S.Ct. at 1558 – 59. The State acknowledges that the blood draw in question was obtained without a search warrant. However, as discussed at length in Section A of the Argument above – Finding of Fact 35, which is incorporated by reference at this section of the State's Brief, exigent circumstances existed in this case justifying the warrantless blood draw in question. As such, the warrantless blood draw was appropriate.

D. There is no requirement for a search warrant to test blood obtained pursuant to exigent circumstances where the only test of the blood will be for alcohol or drugs.

The State acknowledges that it did not obtain a search warrant to search Defendant's blood once it was obtained. The State also acknowledges that it would have had time to obtain a search warrant for

Defendant's blood and exigent circumstances did not exist for the search of the blood itself. That said, no such warrant requirement exists for the search of blood in Washington under the circumstances present in the instant case.

Before discussing that issue the State would first like to lay to rest the Defense notion that Defendant's blood might have been tested or preserved for subsequent DNA testing or other nefarious purposes. RP 105 – 108.

This line of reasoning conflates the only purpose of a blood draw in a Vehicular Assault (alcohol/drug prong) or DUI (with serious bodily injuries), which is to test for substances that may have affected a suspect's ability to safely operate a motor vehicle, with some unspecified Orwellian conspiracy. First, the special evidence warning states the only reason the blood will be tested: "A test of your blood will be administered *to determine the concentration of alcohol and/or any drug in your blood*... ." CP Exh. 2. [Italics added]. This is consistent with the overall purposes of RCW 46.20.308. The State submits that the only rational reading of the portion of the statute addressing blood tests restricts the testing of blood for the sole purpose of determining the presence and amount of alcohol or drugs, if any.

With respect to RCW 46.20.308(3) as then in effect, "a ... *blood test may be administered without the consent of the individual so arrested*

... *when exigent circumstances exist.*" [Italics added]. Taken in context the State submits that by "blood test" the Legislature meant that the first part of the blood test could commence i.e. the blood draw itself, if exigent circumstances exist.

As discussed previously, exigent circumstances justifying the blood draw existed at the time Deputy Przygocki requested Captain Manly conduct a blood draw. Defendant urges this Court to rule that once blood is seized under exigent circumstances, a search warrant must be in place before the blood can actually be analyzed. For this proposition Defendant cites *State v. Martines*, 184 Wn.2d 83, 355 P.3d 1111 (2015). Defendant's reliance on *Martines* is misplaced. As Defendant recognized, the *Martines* Court stated, "a warrant authorizing extraction of a blood sample necessarily authorizes testing of that sample for evidence of the suspected crime." *Id.* at 184 Wn.2d 83, 93 – 94.

Judge Harper applied *Martines* to the case at bar as follows:

> Then the Court says, the purpose of the warrant was to draw a sample of blood from Martines to obtain evidence of DUI. If I paraphrase that language, I mean, I can say, the purpose of the blood draw with exigent circumstances – in other words, in lieu of a warrant – was to draw a sample of blood from Martines to obtain evidence of a DUI.
>
> So in other words, the exact same purpose existed for this blood draw. He didn't do the blood draw for a DNA sample, or to find out if this guy had an infectious disease, or whether – or anything. I mean the whole purpose of it entirely was, was simply to determine if there was evidence of DUI.

> And, then the rest of the decision makes sense with what I'm deciding. And that is that there's no other reason to draw the blood. There's no other rea – and, and so everybody knows. It's going to be tested to see if there's evidence of DUI and evidence of DUI would be alcohol content or drug content.
>
> ... The authority to test the blood goes hand in hand with the draw of the blood under exigent circumstances as an exception to the warrant requirement.

RP 120 – 121.

This is analogous to a statement by the late Justice Scalia in *Birchfield v. North Dakota*[2], also cited by the defense:

> ("When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search"). And by the same token, if such warrantless searches are constitutional, there is no obstacle under federal law to the admission of the results that they yield in either a criminal prosecution or a civil or administrative proceeding.

If the warrantless blood draw was constitutional, there is no obstacle under current Washington law the State is aware of, to the admission of the results yielded.

In *Birchfield* the Court focused on the connection between DUI cases, breath and blood testing and searches incident to arrest. *Id* at 2174. This case is not a search incident to arrest case. It is an exigent circumstances case. The *Birchfield* case specifically recognized the validity of the Court's exigent circumstances DUI case law including,

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[2] ___ U.S. ___, 136, S.Ct. 2160, 195 L.Ed.2d 560 (2016).

Michigan v. Tyler[3], *Schmerber v. California*[4], and its recent decision in *McNeely*. *Id.* at 2173 – 2174. Thus even under a Birchfield analysis, the blood tests would be permitted to be analyzed.

Defendant also references *Riley v. California*[5]. This was a case where the U.S. Supreme Court found in two joined cases that digital information on a cell phone was subject to Fourth Amendment protection where seized in a search incident to arrest and that to search the cell phones the police needed to obtain a search warrant. 134 S.Ct. at 2481, 2495.

Riley is distinguishable from the case before this Court in that it 1) addresses digital information, and 2) involves searches incident to arrest and cell phones found on the suspects. What most distinguishes Riley from the present case however, is that Riley involved the search of two cell phones where essentially, everything was "fair game." That is, any information contained on the phones had the potential to be viewed. Here, the search of Defendant's blood was limited to a search for evidence of alcohol or drug consumption. The State did not seek, in this limited search to discover, all the other possible things blood can be tested for e.g.

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[3] 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978)
[4] 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)
[5] ___ U.S. ___, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014)

DNA, parentage issues, venereal diseases, etc. For those reasons, the limited search of Defendant's blood did not require a search warrant.

IV. CONCLUSION

For the foregoing reasons, Defendant's conviction and sentence should be affirmed.

Respectfully submitted this 19th day of June, 2017.

MICHAEL E. HAAS, WSBA #17663
Jefferson County Prosecuting Attorney
Attorney for Respondent

PROOF OF SERVICE

I, Sarah Martin, declare that on this date:

I filed the State's BRIEF OF RESPONDENT electronically with the Court of Appeals, Division II, through the Court's online filing system. I delivered an electronic version of the brief, using the Court's filing portal, to:

Richard L. Davies, WSBA #18502
daviesrl@ptdefense.com

I declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct. Dated this 19th day of June, 2017, and signed at Port Townsend, Washington.

Sarah Martin
Senior Legal Assistant

JEFFERSON COUNTY PROSECUTING ATTORNEY'S OFFICE

June 19, 2017 - 3:17 PM

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